No. 90-98

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

GEORGE FRANKLIN, *et al.*,
Petitioners,

vs.

PEAT MARWICK MAIN & CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

Statutes

Secondary Authority

No. 90-98

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I.
INTRODUCTION

The two respondents' briefs opposing certiorari take different tacks in seeking to avoid this Court's review, but neither is satisfactory. Respondent Prudential-Bache Securities, having sought additional time to respond "[b]ecause of the significance of this appeal,"[1] acknowledges the conflict between the Second and Ninth Circuits on the first question presented, Prudential-Bache Brief at 11 n.2, and essentially argues for affirmance. *Id.* at 9-18. Respondent Peat Marwick, on the other hand, goes to great lengths to argue that whatever the outward appearance, there is not *really* a conflict between the circuits on the first question. Neither respondent can dispel the fact that the first question is highly significant, has generated conflicting decisions in the lower federal courts, was decided by the Ninth Circuit in a manner which it acknowledged was inconsistent with prevailing authority in the Second Circuit, and cries out for prompt and definitive resolution.

As to the second question (the right to contribution under Section 10(b) and Section 12), respondents are aligned, with both asserting that the issue was not properly preserved below. They are wrong, as the law did not require — indeed did not permit — petitioner to present this issue to a panel of the Ninth Circuit, as that Circuit had already resolved the issue in another case. Petitioner presented the issue as soon as was appropriate: by suggestion for rehearing *en banc*. Moreover, the second question can be decided as a threshold issue necessarily raised by the third question presented, which plainly was preserved at all levels.

Finally, although both respondents have chosen to spend substantial portions of their energy arguing the merits, they fall back incessantly upon the false assertion that this case presents the question of who will bear the risk of "an

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[1]Letter of July 27, 1990 from Robert D. Feighner to the Honorable Joseph F. Spaniol, Jr.

inadequate" or "unfairly low" settlement. Prudential-Bache Brief at 9, 11, 12; *see also* Peat Marwick Brief at 15. On the contrary, this case presents the highly significant and recurring question of the legal effect of an *adequate* settlement with a defendant of *inadequate* means.[2]

II.

THE LOWER COURTS ARE IN DISARRAY, THE CIRCUITS ARE SPLIT AND NUMEROUS LARGE CASES HANG IN THE BALANCE ON THE QUESTIONS PRESENTED

Respondent Peat Marwick argues that because its skilled attorneys can devise arguable rationales to "reconcile" the widely varying precedents among the circuits, there is no unqualified conflict among the circuits for this Court to resolve. Peat Marwick ignores the fact that the courts themselves perceive a conflict among the circuits on the appropriate contribution bar rule. As to the question of whether contribution may be implied under Section 10(b), Peat Marwick focuses on strained distinctions hoping to distract this Court's attention from the fact that the crucial

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[2]Because this case will affect not only private securities litigation, but also efforts by the bank regulatory agencies to recover losses from the savings and loan scandal, the Court may wish to solicit the views of the Solicitor General on this petition. Indeed, the Federal Deposit Insurance Corporation ("FDIC") sought leave to file an amicus curiae brief supporting en banc rehearing of this case. At least two district courts in the Ninth Circuit have stated that they will apply the "proportional culpability" offset rule from this case to partial settlements entered into between the FDIC and former directors and officers of failed savings institutions. *FDIC v. Strategic Investment Services*, No. 88-1769 (S.D. Cal. July 9, 1990) (oral bench ruling); *FSLIC v. Fitzpatrick*, No. 86-6780 (C.D. Cal. July 25, 1990) (order confirming July 17, 1990 bench ruling). The decison below adopts its proportional offset contribution bar from *In re Sunrise Securities Litigation*, 698 F. Supp. 1256 (E.D. Pa. 1988), where the rule was applied against the Federal Savings and Loan Insurance Corporation ("FSLIC") in the partial settlement of claims arising out of operations of the Sunrise Savings and Loan Association.

underlying conflict is not just between the Ninth Circuit and other lower courts, but between the Ninth Circuit and this Court's precedents.

A. The Contribution Bar Rule Announced Below Conflicts With Precedents In Other Circuits

Respondents purport to reconcile the Ninth Circuit's opinion in this case with the precedents of the other circuits on hypertechnical grounds — that they "were either not decided under the federal securities laws or did not involve an attempt to extinguish the contribution rights of nonsettling defendants." Peat Marwick Brief at 11-12. Respondents do not explain *why* decisions holding that a pro tanto offset is sufficient to *satisfy* a right to contribution do not conflict with the Ninth Circuit's holding that the same pro tanto offset is insufficient to "extinguish" the right. This truly is a distinction without a difference.

Respondent Peat Marwick contends that the Ninth Circuit's approach does not depart from the rules of law articulated in *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 729 (1990). It ignores the fact that the Ninth Circuit's opinion in this case *expressly refused* to follow *Singer*.[3] Respondent

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[3] *See* App. A at 17a-22a. Peat Marwick also contends that the Court of Appeals did not reject the "one satisfaction rule" articulated in *Singer*, but its rejection could not be clearer: "We are not convinced that the efficient and equitable administration of this statutorily mandated right must yield to the logic of a general rule." App. A at 22a. The proportional offset rule it adopts allows plaintiffs to obtain a judgment from the nonsettling defendants that affords them *more than their actual damages*, if the amount they have obtained in partial settlement exceeds the proportional liability of the settling defendants. *See* App. A at 21a-22a; *accord Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 553 (D. Colo. 1989) ("If settling defendants pay an amount greater than their proportionate fault as later determined at trial, plaintiff benefits because it retains the entire prior settlement" *in addition to* the proportional liability obtained at trial from the nonsettling defendants.); *In re Sunrise Securities Litigation*, 698 F. Supp. 1256, 1258 (E.D. Pa. 1988)

Prudential-Bache more candidly acknowledges the "appellate court's rejection of the Second Circuit's position in *Singer*," but attacks *Singer* as "fail[ing] to consider the various competing concerns addressed" by the Ninth Circuit here. Prudential-Bache Brief at 11 n.2. Attacking the reasoning of *Singer* does not eliminate the conflict.

Indeed, commentators confirm that "[w]ith the *Kaypro* decision, the approaches taken by the courts are in clear conflict." Goodman, Belgum & McDonald, "Contribution and Partial Settlement in Federal Securities Laws Cases," 4 *Insights* 15, 15 (May 1990). District courts too have recognized that the circuits are in conflict. *See Dalton v. Alston & Bird,* [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,348, at 96,683-85 (S.D. Ill. 1990) (rejecting *Franklin* in favor of *Singer*).[4]

(rejecting pro tanto rule which "prevents 'double recovery by a plaintiff' "); *see also* Peat Marwick Brief at 19 & n.13. Of course this violates the explicit congressional mandate of Section 27 of the Securities Act of 1934, that "no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages." 15 U.S.C. § 78bb. It is, however, the law of the Ninth Circuit unless corrected by this Court.

[4]Even if the circuits were not in direct conflict, it would be appropriate to grant certiorari because of the importance of the questions presented and the conflicting views in the lower courts. In *Dawson Chemical Co. v. Rohm & Haas Co.,* 448 U.S. 176, 185 & n.4 (1980), the Court granted certiorari "to forestall a possible conflict in the lower courts" on an "important" issue, even though there was "no direct conflict" among the several district court and court of appeals decisions on the issue. The Court has granted certiorari on important issues based on district court conflicts as well. *See Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 646 n.9 (1981) (citing four district court opinions); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 257 n.14 (1981) (citing four district court opinions); *Curtis v. Loether,* 415 U.S. 189, 191 n.2 (1974) (citing "evenly divided" district court decisions as a reason for grant of certiorari); *Massachusetts v. United States,* 435 U.S. 444, 453 (1978) (certiorari granted on a conflict between a court of appeals decision and a district court).

Aside from debating whether the decision below is in four-square conflict with *Singer,* respondents do not seriously dispute the significance of the case or the importance of prompt resolution by this Court. Scores of pending securities fraud class actions are affected by the decision, as settlement negotiators must take into account the decision below, and whether it will remain the law, and become the law in other circuits. Other cases, some involving important governmental interests, *see* n.2, *supra,* will also be affected by the opinion below.

B. The Ninth Circuit's Rule That There Is An Implied Right To Contribution Under Section 10(b) Places That Circuit In Conflict With Precedents In The Other Circuits And With The Decisions Of This Court

The Ninth Circuit's holding that a right to contribution may be implied under the federal securities laws — and under Section 10(b) in particular — conflicts with this Court's reasoning in *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981). That alone is a compelling ground for a writ of certiorari to issue.[5] The Ninth Circuit's recognition of an implied right to contribution is based on the kind of general policy rationales that this Court expressly rejected as wholly inappropriate to the question of whether a right to contribution may be implied by the judiciary.[6]

Although respondents deny it, there is also a conflict among the circuits on the question of implied contribution under the federal securities laws. Petitioners' opening brief cites numerous decisions in other circuits which hold that

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[5] *See Army & Air Force Exchange Service v. Sheehan,* 456 U.S. 728, 733 (1982) (certiorari granted where the opinion below "appeared to be in conflict with our precedents").

[6] *See Texas Industries,* 451 U.S. at 635-36, 638; *Northwest Airlines,* 451 U.S. at 89-90, 98-99.

because *Northwest Airlines* and *Texas Industries* are controlling, lower courts *may not* create implied rights of contribution under the federal securities statutes. The Ninth Circuit ignored this Court's holdings to create just such a right.[7] Respondents dismiss numerous precedents on the ground that they were rendered by district courts. They distinguish appellate decisions on the ground that they address different sections other than Section 10(b) — such as Section 12. *But Section 12 claims were part of the settlement in this case.* None of the respondents' purported distinctions changes the fact that the Ninth Circuit is in conflict with this Court, and with the lower courts which have obeyed this Court's mandate. Once again, the conflict is real and serious, and warrants review by this Court.

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[7]Respondents' "conceptual" argument that the right of contribution necessarily inheres in the very concept of joint and several liability, *see* Peat Marwick Brief at 14; Prudential-Bache Brief at 22, cannot be reconciled with this Court's opinions in *Northwest Airlines* and *Texas Industries*. Those opinions, like the common law, recognize joint and several liability and prohibit contribution! *See Northwest Airlines*, 451 U.S. at 86; *Texas Industries*, 451 U.S. at 646 ("[n]or does the judicial determination that defendants should be jointly and severally liable suggest that courts may order contribution").

Although a defendant's right to contribution can exist, conceptually, *only if* the plaintiff has a prior right to joint and severaly liability, the right to contribution *is not* a logical extension of joint and several liability. There can be no doubt: the victim of fraud's right to be made whole is more fundamental than, and superior to, any wrongdoer's right to contribution. *See Texas Industries*, 451 U.S. at 646; *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1104- 06 (4th Cir. 1989). The Ninth Circuit erred by elevating contribution above the victim's right to be made whole. "[W]e are speaking of equities between wrongdoers," the court below recognized, but "we decline to back away from our goal of equity" *for the perpetrators of fraud*, whatever the cost to their victims. App. A at 19a.

C. This Issue Of An Implied Right Of Contribution Under Section 10(b) Of The Securities Exchange Act of 1934 Was Properly Preserved Below

In *Smith v. Mulvaney,* 827 F.2d 558, 561 (9th Cir. 1987), the Ninth Circuit held that there was an implied right of contribution among defendants under Section 10(b). With *Smith* on the books, petitioners did not distinguish between Section 11 and plaintiffs' other claims in the district court, where petitioners prevailed, nor did they do so before the Ninth Circuit.[8] In both courts the issue of whether there is an implied right to contribution under Section 10(b) was foreclosed by *Smith,* and it would have been futile to argue for an overruling of that decision.[9]

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[8]Petitioners in their Court of Appeals brief *called attention to the issue,* conceding that for proceedings before the three-judge panel they would have to "assume the existence of implied rights of contribution under these statutes," but indicating that *Smith* had failed to engage in proper analysis "articulated by the Supreme Court." *See* Appellees' Brief at 24 n.15 (quoted in part in Peat Marwick Brief at 25-26). This Court's precedents indicate that for an issue to be raised it is enough merely to bring the issue to the lower court's attention. "[I]f the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adquately presented." *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928) (footnote omitted); *see Eddings v. Oklahoma,* 455 U.S. 104, 113-14 n.9 (1982); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 217 n.3 (1968). Respondent Peat Marwick concedes that petitioners did precisely this in their opening brief to the three-judge panel. *See* Peat Marwick Brief at 25-26. After the panel rendered its decision, petitioners requested a rehearing *en banc* so that the Ninth Circuit could overrule *Smith* and bring its law into conformity with this Court's precedents.

[9]Three-judge panels of the Ninth Circuit cannot consider arguments that prior authority in the circuit was wrongly decided absent an *intervening* decision of the Supreme Court. Indeed, to direct such arguments to a three-judge panel is to "ignore the well-established principle that [the panel] cannot overrule Ninth Circuit precedents without convening en banc." *Kennedy v. Los Angeles Police Dept.,* 901 F.2d 702, 707 n.3 (9th Cir. 1989). "Such a request will only be considered by an en banc court." *United States v. Spilotro,* 800 F.2d 959,

Once petitioners were free of this restriction, they did argue, in their suggestion for rehearing en banc, that *Smith* was wrongly decided, and was inconsistent with the most recent decisions of this Court. Petition for Rehearing with Suggestion for Rehearing En Banc at 14; *see* Peat Marwick Brief at 25-26.

Given this set of facts, respondents' waiver argument is misplaced. Moreover, any deficiency in the particularity with which an issue is raised is cured by the fact that the court below expressly considers or decides the issue[10] — as the Ninth Circuit did in this case. "For we need not inquire how and when the question . . . was raised when such question appears to have been actually considered and decided by that court." *Charleston Federal Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-86 (1945). The panel's opinion unambiguously states: "it has been determined that a right to contribution exists under claims based on section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission's rules." *Franklin,* App. A at 9a. Analysis need proceed no further than the opinion itself to establish that the issue was thus raised and decided in a fashion that renders it fully appropriate to invoke this Court's jurisdiction to correct the Ninth Circuit's holding. *Charleston Federal,* 324 U.S. at 185-86.

Finally, it must be noted that the viability of contribution under Section 10(b), and Section 12 is fairly raised as encompassed in the question of what contribution bar rule should apply to the settlement of Section 10(b) and Section

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967 (9th Cir. 1986) (Kennedy, J.); *see, e.g., Christoffel v. E.F. Hutton & Co.* 588 F.2d 665, 667 (9th Cir. 1978).

[10]*See Payton v. New York,* 445 U.S. 573, 582 n.19 (1980); *Burch v. Louisiana,* 441 U.S. 130, 133 n.5 (1979); *Orr v. Orr,* 440 U.S. 268, 274-75 (1979); *Franks v. Delaware,* 438 U.S. 154, 161-62 (1978); *Casteneda v. Partida,* 430 U.S. 482, 485 n.4 (1977); *Jenkins v. Georgia,* 418 U.S. 153, 157 (1974); *Ward v. Monroeville,* 409 U.S. 57, 61 (1972); *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295, 299 n.3 (1971); *Dyke,* 391 U.S. at 217 n.3; *Raley v. Ohio,* 360 U.S. 423, 436-37 (1959).

12 claims in this action. Without contribution rights, there is plainly no need (or legal basis) for a contribution bar judgment reduction. Thus, since the first and third questions are properly presented and preserved, the second question may be decided as a necessary step in the Court's analysis.[11]

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[11]Respondents contend that petitioners negotiated to be bound by the same terms imposed by the Ninth Circuit. That is not true.

The settling defendants anticipated the possibility that the nonsettling defendants might appeal, and might even persuade the Ninth Circuit to impose different rules of offset than those agreed to by the settling parties and previously approved by several district courts within the Ninth Circuit. Accordingly, the settling defendants demanded complete protection, in the form of a "back up" clause providing that if the nonsettling defendants prosecuted a successful appeal of the district court's order, the settlement would effect a reduction in judgment to the extent necessary to protect the settling defendants from liability to the nonsettling defendants. This by no means moots this petition for certiorari, which seeks to correct the decision of the Ninth Circuit and to reestablish the pro tanto offset so that plaintiffs may be made whole. Moreover, this case-specific arrangement designed to protect settling defendants in this ground- breaking case does not undermine petitioners' assertion that the rule below will deter many settlements.

III.

CONCLUSION

The petition for writ of certiorari should be granted on all three questions.

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Respectfully submitted,

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